

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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MAR 27 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Conectiv, Transferor)

and)

New RC, Inc., Transferee)

For Authority to Transfer Control of)
 Domestic Section 214 Authority of)
 Conectiv Communications, Inc.)

CC Docket No. 02-2

OPPOSITION TO PETITION TO DENY

New RC, Inc. ("New RC"), and Conectiv ("Conectiv") (collectively "the Applicants"), pursuant to Section 63.53(c) of the Commission's Rules, 47 C.F.R. Sec 63.53(c), and by their attorneys, hereby submit their Opposition to the Petition to Deny filed on March 14, 2002 ("Petition"), by Yipes Transmission, Inc. ("Yipes"), and respectfully urge the Federal Communications Commission ("Commission" or "FCC") to reject the Petition and grant their Application for Consent to Transfer of Control.¹

BACKGROUND

On December 28, 2001, the Applicants filed their Application for Authority to Transfer Control of Conectiv Communications, Inc. ("CCT") from Conectiv to New RC with respect to

¹ Oppositions are due ten days after a Petition to Deny is filed. 47 C.F.R. §1.45(b). The tenth day after March 14 was Sunday, March 24. The three-day mail rule permits an additional three days (excluding holidays) to be added, making the instant Opposition due on Wednesday, March 27, 2002. See 47 C.F.R. §1.4(h).

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Domestic Interstate Service ("Section 214 Application"). Potomac Electric Power Company ("Pepco"), Conectiv and New RC entered into an Agreement and Plan of Merger on February 9, 2001, in which Pepco will acquire Conectiv, and Pepco and Conectiv will become two wholly-owned subsidiaries of New RC. CCI will remain a subsidiary of Conectiv and indirect subsidiary of New RC. The CCI facilities subject to the Section 214 Application are operational fixed microwave facilities extending through northeastern Virginia, eastern Maryland and Delaware. The Section 214 Application was placed on Public Notice on February 12, 2002.² With copies served by U.S. Mail, Yipes filed its Petition to Deny on March 14, 2002.³

SUMMARY OF ARGUMENT

Telecommunications carriers alleging violations of Section 224 of the Communications Act and related Commission rules may file a pole attachment complaint before the Commission or before a state in those instances in which a state has certified that it has authority to adjudicate such disputes. Comprehensive rules and procedures are in place to resolve such disputes, and such rules do not contain a special exception or establish alternate procedures in instances where one of the parties is engaged in a proposed merger or acquisition. Consistent with Section 224, Yipes is required to pursue its pole attachment claims before the Public Service Commission of the District of Columbia with regard to Pepco's facilities located in Washington D.C. or before the FCC pursuant to established pole attachment complaint procedures with regard to Pepco's Maryland facilities. The Yipes Petition to Deny does not raise significant policy questions or

² Public Notice, Domestic Section 214 Application Filed by Conectiv Communications, Inc. to Transfer Control to New RC, Inc., Pleading Cycle Established, DA 02-330 (Feb. 12, 2002).

³ On March 22, 2002, Yipes Communications, Inc. filed a voluntary petition for reorganization under Chapter 11 in the U.S. Bankruptcy Court in San Francisco, California. It is unclear how this bankruptcy proceeding will affect the capability of Yipes, the apparent subsidiary of Yipes Communications, Inc., to build out its Washington, D.C.-area system. See Yipes Communications, Inc., *Yipes Files for Voluntary Reorganization* (visited Mar. 26, 2002) <http://www.yipes.com/buzz/PressRelease158.html>.

establish any foundation to support Yipes' suggestion that Pepco has engaged in systematic discriminatory or anti-competitive behavior.

In denying the Petition, the Commission would not be limiting its broad discretion under the public interest standard of Section 214. Rather, it would be affirming the express directions of Section 224 of the Act and the applicable rules and regulations. Yipes would not be prejudiced by being obligated to seek its desired relief pursuant to the controlling provisions of the Act and the Commission's rules. In this circumstance where a telecommunications carrier has ample opportunity to seek and, if proved, obtain the desired relief, the public interest lies in granting the Section 214 Application, thereby permitting the proposed merger of the energy utilities to move forward.

DISCUSSION

Yipes contends that the failure of Pepco and Yipes to enter one or more agreements for access to Pepco's poles and underground infrastructure is inconsistent with 47 USC § 224.⁴ Yipes alleges that it first contacted Pepco to obtain access to conduit located in the District of Columbia in January 2001.⁵ Yipes does not specify when it sought access to Pepco's Maryland facilities, but an e-mail attached at Exhibit 5 to the Petition indicates that access was initially requested on or before October 19, 2001.⁶

The Communications Act requires that complaints associated with access to utility poles and underground infrastructure located in the District of Columbia must first be brought before

⁴ Petition to Deny at 2.

⁵ Petition to Deny at 2. *See also* July 27, 2001, letter from Mary E. Wand to Mike Bowlin [sic], attached to Petition to Deny at Exhibit 1.

⁶ *See* October 19, 2001 e-mail from Wilbert Ollison to David Noce, attached to Petition to Deny at Exhibit 5, in which Pepco provides an estimate to Yipes for some unidentified Maryland facilities.

the Public Service Commission of the District of Columbia. While Section 224(b)(1) of the Communications Act generally directs the Commission to regulate the rates, terms and conditions of pole attachments,⁷ Section 224(c)(1) divests the Commission of jurisdiction if the facilities are located in a state that has certified to regulating pole attachments and adopted pole attachment regulations.⁸ The Commission's Public Notice of February 21, 1992 confirms that the District of Columbia has certified to regulating the rates, terms and conditions for pole attachments, and has issued rules and regulations implementing its pole attachment authority.⁹ This certification constitutes "conclusive proof" that the FCC lacks jurisdiction.¹⁰ In fact, the Commission's rules require the dismissal of pole attachment complaints for lack of jurisdiction if the utility facilities are located in states for which "a suitable state certificate has been filed" with the Commission.¹¹

The Petition to Deny is also procedurally flawed with respect to Pepco's facilities located in Maryland. For utility facilities located within states subject to the Commission's Section 224 jurisdiction, the Pole Attachment Act requires specific "procedures necessary and appropriate to hear and resolve complaints concerning [pole attachment] rates, terms and conditions."¹² The Commission's "Pole Attachment Complaint Procedures," promulgated in Subpart J of Title 47,

⁷ 47 U.S.C. § 224(b)(1).

⁸ 47 U.S.C. § 224(c)(1) ("Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and right-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.")

⁹ Public Notice, "States that have Certified that they Regulate Pole Attachments," 7 FCC Rcd 1498, DA 92-201 (1992).

¹⁰ 47 C.F.R. § 1.1406.

¹¹ See 47 C.F.R. § 1.1406 ("The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to 1.1414 of this subpart. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission."); and Public Notice, "States that have Certified that they Regulate Pole Attachments," 7 FCC Rcd 1498, DA 92-201 (1992) (indicating that the District of Columbia has certified that it regulates pole attachment rates).

¹² 47 U.S.C. § 224(b)(1).

Part 1,¹³ contain detailed procedures to resolve access complaints and to establish just and reasonable rates, terms and conditions of pole attachment agreements. These rules were carefully designed to balance and protect the competing rights and interests of requesting carriers and utilities. For example, the rules specify the information and documentation to be included in a pole attachment complaint.¹⁴ A statement regarding jurisdiction must be included.¹⁵ Denial of access complaints must be filed within a certain amount of time after the denial, and must be supported by specific data and information.¹⁶ Thirty (30) days are provided for responding to complaints.¹⁷ In addition, pole attachment complaints are now resolved by the Enforcement Bureau.¹⁸

Ironically, the Petition to Deny repeatedly alleges Pepco violations of the pole attachment rules as grounds to deny the Section 214 Application while ignoring the applicable statutory scheme and procedural rules.¹⁹ Rather than satisfy or even make a good faith effort to satisfy the Commission's rules, Yipes takes the far less burdensome and convenient path of filing a Petition to Deny, the sole purpose of which is to threaten denial of the Applicant's Section 214 Application as a means to force a more favorable resolution of its negotiations. Despite the frustrations that Yipes may have with respect to the pace of pole attachment negotiations, no determination has been made that Pepco has violated any of the District of Columbia's conduit

¹³ 47 C.F.R. §§ 1.1401 *et seq.*

¹⁴ 47 C.F.R. § 1.1404.

¹⁵ 47 C.F.R. § 1.1404(c).

¹⁶ 47 C.F.R. § 1.1404(n).

¹⁷ 47 C.F.R. § 1.1407.

¹⁸ 47 C.F.R. § 0.111 (effective March 25, 2002). *See* Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, "Order," FCC 02-10 (released Mar. 14, 2002). *See also* Public Notice, FCC Announces Effective Date for Reorganized Bureaus (Mar. 8, 2002).

¹⁹ Petition to Deny at 2-4, 7. In support of these factual allegations, Counsel for Yipes signed the affidavit accompanying the Petition, even though the rules call for an officer of Yipes to sign such an attestation of facts. *See* 47 C.F.R. 1.1404(a).

access or pole attachment rules, and no such determination will be made unless and until Yipes files the appropriate complaint in the District. Likewise, no determination has been made that Pepco has violated Section 224 or the FCC's conduit and pole attachment rules with respect to its Maryland facilities, and no such determination can be made unless and until Yipes files a complaint with the Commission pursuant to the applicable rules. The conclusion is inescapable that the Petition to Deny has the look and feel of a "strike" pleading, filed "for the primary and substantial purpose of delay."²⁰

Moreover, the Petition to Deny does not raise novel issues of policy or fact that warrant an adverse public interest finding. The facts alleged by Yipes, even if they were accepted as true after a proper hearing, do not on their face support Yipes' claim that Pepco is engaged in systematic discriminatory or anti-competitive behavior.²¹ It should be noted that based upon reasonable inquiry, Pepco cannot recall or identify any complaints being lodged before either the Public Service Commission of the District of Columbia or the Commission in connection with matters governed by Section 224.²² Moreover, the e-mail printouts filed by Yipes in support of the Petition to Deny confirm that Yipes and Pepco exchanged agreements, that Yipes changed its mind on the form of agreement it was willing to negotiate, and that Pepco committed significant staff resources to provide cost estimates of necessary construction and engineering work to accommodate Yipes' requests.²³

²⁰ *KLUV(FM)*, 10 FCC Rcd 4517 (1995), citing *Radio Carrolton*, 69 FCC 2d 1139, 1150 (1978). See also *Community Service Broadcasting, Inc.*, 7 FCC Rcd 5652, at ¶7 (1992) (Strike pleadings are filed "for the purpose of impeding, obstructing or delaying the grant of a competing application").

²¹ See Petition to Deny at 4-5.

²² See attached Declaration of William M. Gausman.

²³ Petition to Deny at Exhibits 2, 3, 5, 6.

Yipes also suggests that by virtue of the proposed merger Conectiv will engage in activities inconsistent with or proscribed by Section 224.²⁴ Yipes provides no foundation for this assertion. Yipes does not allege that it has requested access to infrastructure of the electric utilities currently subject to Conectiv's control or that after making such request access was denied. Yipes does not allege that the Conectiv common carrier facilities that are the object of the Section 214 Application fall within the scope of the access discussions between Pepco and Yipes. That Conectiv has no relation to the allegations Yipes raises in connection with Pepco serves only to underscore the questionable nature of the Petition and further supports prompt denial by the Commission.

WHEREFORE, THE PREMISES CONSIDERED, the Applicants respectfully request the Commission to deny Yipes' Petition to Deny without prejudice to Yipes seeking relief pursuant to Section 224 of the Act, to grant the Section 214 Application, and to take other action consistent with the public interest.

Respectfully submitted,

**NEW RC, INC.
CONECTIV**

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Dated: March 27, 2002


²⁴ See Petition to Deny at 6.

DECLARATION OF WILLIAM M. GAUSMAN

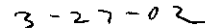
I, William M. Gausman, do hereby state as follows:

1. I am General Manager, Asset Management of the Potomac Electric Power Company ("Pepco").
2. Based upon reasonable inquiry, Pepco cannot recall or identify any complaints being lodged against it before either the Public Service Commission of the District of Columbia or the Federal Communications Commission in connection with matters governed by Section 224 of the Communications Act.

I declare under penalty of perjury that the foregoing is true and correct.



William M. Gausman



Date

CERTIFICATE OF SERVICE

I, Cassandra L. Hall, do hereby certify that a copy of the foregoing pleading was served this 27th day of March, 2002, upon the following:

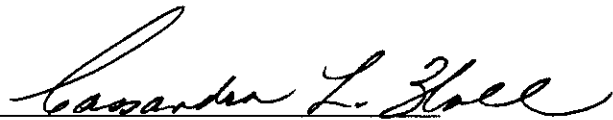
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